STATE OF MICHIGAN

COURT OF APPEALS

GWENDOLYN ROBINSON, Personal Representative of the Estates of MACHEKIA ROBINSON, Deceased, ROCKELL JOHNSON, Deceased, and TARIA JOHNSON, Deceased, and as Next Friend of DA'NAJAH FRANKLIN, a Minor,

Plaintiff-Appellant,

v

STATE OF MICHIGAN and DEPARTMENT OF CORRECTIONS,

Defendants-Appellees.

UNPUBLISHED
November 7, 2006

No. 270781
Court of Claims
LC No. 06-000036-MM

Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Gwendolyn Robinson, as the personal representative of the estates of Machekia Robinson (Machekia) and two of Machekia's daughters (Rockell and Taria), and as next friend of Machekia's other daughter (Da'Najah), filed the instant action against the state of Michigan and the Department of Corrections (DOC), alleging that Daniel Franklin murdered Machekia and two of her daughters on June 22, 2003, after Franklin was erroneously released on parole. Machekia's other daughter, Da'Najah, allegedly witnessed the murders. Plaintiff sought damages from the state and the DOC for violations of Machekia's and her children's substantive due process rights under the Michigan Constitution. Defendants, without answering the complaint, moved for summary disposition under MCR 2.116(C)(7) based on governmental immunity. The trial court granted the motion, concluding that governmental immunity applied without exception.

On appeal, plaintiff challenges only the trial court's grant of summary disposition in favor of the DOC. Plaintiff argues that she sufficiently pleaded a substantive due process claim grounded on the DOC's failure to adequately train its employees. We disagree.

We review the trial court's decision de novo to determine whether the DOC was entitled to judgment as a matter of law. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). Although the trial court did not state the particular subrule of MCR 2.116(C) on which it relied to grant summary disposition in favor of the DOC, this Court may review the trial court's decision under the proper rule. *Spiek v Dep't of Transportation,* 456 Mich 331, 338; 572 NW2d 201 (1998). We will not reverse a trial court's decision where the right result was reached. *Willett v Waterford Twp,* 271 Mich App 38, 55; 718 NW2d 386 (2006).

Appellate review under MCR 2.116(C)(7) is appropriate where a defendant's motion for summary disposition, grounded on immunity provided by law, depends on evidence outside the pleadings. See *Conmy v Dep't of Transportation*, ___ Mich App ___; ___ NW2d ___ (Docket No. 266943, issued June 22, 2006, rel'd for publication August 24, 2006); *Willett, supra* at 45-47. In this case, however, we find the allegations in plaintiff's complaint dispositive of this appeal and, accordingly, consider plaintiff's arguments under MCR 2.116(C)(8). Cf. *Mack v Detroit,* 467 Mich 186, 193; 649 NW2d 47 (2002). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Maiden, supra* at 119.

Because the DOC is a state department, this matter actually involves a claim of "sovereign immunity," rather than "governmental immunity." *Pohutski v City of Allen Park,* 465 Mich 675, 683; 641 NW2d 219 (2002). In any event, it was necessary that plaintiff plead facts in avoidance of immunity to survive summary disposition under MCR 2.116(C)(8). *Mack, supra* at 203. In general, a party pleads facts in avoidance of immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate the exercise or discharge of a nongovernmental or propriety function. *Id.* at 204. The governmental tort liability act, MCL 691.1401 *et seq.*, allows suits in certain areas, but the Legislature has also allowed specific actions under other acts, such as the Civil Rights Act. *Id*. at 194.

The particular claim in this case is not grounded on a statutory exception, but rather is based on the Michigan Constitution, as set forth in *Smith v Dep't of Pub Health,* 428 Mich 540; 410 NW2d 749 (1987), aff'd sub nom *Will v Michigan Dep't of State Police,* 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). The only majority opinion in *Smith* is contained in the memorandum opinion summarizing the holdings on which at least four justices agreed. See *Lewis v State of Michigan,* 464 Mich 781, 786; 629 NW2d 868 (2001). Two holdings relevant to this case are:

> (5) Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action.
>
> (6) A claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases. [*Smith, supra* at 544.]

For purposes of our review, we shall assume, without deciding, that a claim for damages may be based on a substantive due process claim grounded on Const 1963, art 1, § 17. But viewing the factual allegations in plaintiff's complaint in a light most favorable to plaintiff, we hold that plaintiff's failure-to-train theory fails as a matter of law, because plaintiff did not plead a cognizable substantive due process right that was violated by a DOC custom or policy.

This Court, utilizing Justice Boyle's analysis in *Smith, supra,* has generally required that a plaintiff must establish a state custom or policy mandating an employee's action to be actionable. *Reid v State of Michigan,* 239 Mich App 621, 628-629; 609 NW2d 215 (2000); *Carlton v Dep't of Corrections,* 215 Mich App 490, 504-505; 546 NW2d 671 (1996). The execution of the policy or custom must cause a person to be deprived of constitutional rights. *Id.* at 505. Thus, it is necessary to consider both the custom or policy involved and the constitutional rights affected by the execution of the custom or policy in determining whether plaintiff's claim is actionable.

Plaintiff did not allege any custom or policy mandating action, but instead alleged that the DOC's employees committed errors caused by a lack of training. Plaintiff's complaint alleged that the DOC was required to properly train DOC personnel to

> (1) properly classify prisoners so as to prevent their erroneous release from custody, and (2) properly, and in a timely manner, notify the parole board of new information regarding a prisoner after a parole has been ordered but before the prisoner is released on parole, thereby permitting the parole board to suspend the prisoner's release date.

We agree with plaintiff that, under *City of Canton v Harris,* 489 US 378, 388; 109 S Ct 1197; 103 L Ed 2d 412 (1989), the failure to train may, in an appropriate case, amount to a "policy" for purposes of an action under 42 USC 1983, where the failure to train amounts to deliberate indifference. Unlike *Harris,* however, this case does not involve the training of police officers in the performance of their duties with persons with whom they have contact, but rather the training of DOC employees who classify and receive information about prisoners.

In any event, the state due process rights underlying plaintiff's failure-to-train claim are generally construed as providing protection coextensive with federal protections. *By Lo Oil Co v Dep't of Treasury,* 267 Mich App 19, 32; 703 NW2d 822 (2005). Subsequent to the decision in *Harris, supra,* the United States Supreme Court held that the substantive component of the federal Due Process Clause is violated by executive action only if it can be classified, in a constitutional sense, as arbitrary or shocking to the conscious. See *Collins v City of Harker Hts,* 503 US 115; 112 S Ct 1061; 117 L Ed 2d 261 (1992) (city's customary failure to train or warn employees about known workplace hazards did not violate due process). Whether conduct shocks the conscience depends on the matter at hand. *Co of Sacramento v Lewis,* 523 US 833, 849; 118 S Ct 1708; 140 L Ed 2d 1043 (1998).

This case, while based on allegations that the DOC did not train its employees, substantively involves a claim that the DOC did not take proper steps to protect Machekia and her children from Franklin by denying his release on parole. As a general rule, a state has no duty to provide protective services. See *DeShaney v Winnebago Co Dep't of Social Services,* 489 US 189, 197; 109 S Ct 998; 103 L Ed 2d 249 (1989), and *Waddell v Hemerson,* 329 F3d 1300, 1307 (CA 11, 2003) ("[n]o substantive due process right exists to be protected generally from the release from confinement of persons convicted of crimes – even if the release violates state law"). Because plaintiff's failure-to-train claim lacks a cognizable duty owed to them by the DOC, in a constitutional sense, plaintiff's claim fails as a matter of law. No factual development could possibly establish that the substantive due process rights of Machekia or her

children were violated by the DOC's failure to adequately train its employees. Hence, summary disposition under MCR 2.116(C)(8) was proper. *Maiden, supra* at 119-120.

We also reject plaintiff's claim that her complaint pleaded a cognizable substantive due process claim under a state-created danger theory.[1] We note that not all federal circuit courts recognize a state-created danger theory as an exception to the general rule that the federal Due Process Clause does not require a state to protect individuals from violence. See *Waddell, supra* at 1305 (special relationship and state-created danger doctrines superceded by *Collins, supra*), *Rios v City of Del Rio*, 444 F3d 417, 422 (CA 5, 2006) (Fifth Circuit frequently spoke of the state-created danger theory, but did not adopt it or sustain recovery under this theory). Further, the standards applied by those federal circuits recognizing the state-created danger theory have varied, although some form of deliberate indifference is generally required as a minimum standard of culpability. See *Sanford v Stiles*, 456 F3d 298, 310 (CA 3, 2006), cert pending; *Aselton v Town of East Hartford*, 277 Conn 120, 143; 890 A2d 1250 (2006) (discussing federal precedent and adopting a majority view that "the state created danger theory still is viable, but requires conduct that rises to the level of conscience shocking and evidences the requisite degree of culpability, either deliberate indifference to harm or intent to harm").

We further note that this Court has applied the state-created danger theory, as followed in the Sixth Circuit, to claims under 42 USC 1983. See *Manuel v Gill*, 270 Mich App 355, 365-366; 716 NW2d 291 (2006), and *Dean v Childs*, 262 Mich App 48, 53-57; 684 NW2d 894 (2004), rev'd in part on other grounds 474 Mich ___ (2006). But for purposes of our review, we find it unnecessary to decide whether a state-created danger theory should be recognized under the substantive due process component of Const 1963, art 1, § 17, because the factual allegations in plaintiff's complaint are insufficient to state such a claim with respect Machekia or any of her children. Although it was alleged that the DOC received notice that Franklin posed a threat to them, the specific allegations regarding Machekia's communication with the DOC are as follows:

> 21. On June 9, 2003, Machekia Robinson sent an e-mail to the Department of Corrections stating:
>
> "I'd like information how to place a PPO order out on my ex-husband, inmate #231265. Daniel Franklin will be released on June 16th, 2003. Thank you, Machekia Franklin (Robinson)."
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> 22. That same day, Machekia Robinson received a reply from the State of Michigan, Department of Corrections, which stated:
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> "Simply go down to the police station in your area and file for a personal protection order."

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[1] Any claim that plaintiff could proceed under a special-relationship theory has been abandoned because plaintiff does not address this theory on appeal. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Under either the subjective reckless standard followed in the Sixth Circuit, *McQueen v Beecher Community Schools*, 433 F3d 460, 469 (CA 6, 2006), or other formulations of the deliberate indifference standard used in other federal circuit, *Stanford, supra* at 310, plaintiff's allegations regarding Machekia's e-mail correspondence with the DOC were insufficient to satisfy the requisite culpability for a substantive due process claim. The e-mail correspondence gave no notice of an obvious risk of serious harm to Machekia or her children. Further, the DOC employee's conduct of answering Machekia's e-mail with specific information that she requested, even assuming that the DOC employee did so pursuant to a custom or policy, does not constitute deliberate indifference.

Because the factual allegations in the complaint are insufficient to establish the requisite culpability for a substantive due process claim under a state-created danger theory, we affirm the trial court's grant of summary disposition pursuant to MCR 2.116(C)(8). Because the requisite culpability was not pleaded, it is unnecessary to decide whether the DOC's conduct of releasing Franklin on parole created or increased the risk that Machekia and her children would be exposed to an act of violence by Franklin, in the constitutional sense. We note, however, that there is no allegation in plaintiff's complaint that the DOC did anything more than return Franklin to a situation existing before his incarceration. Although the alleged circumstances underlying this case are tragic, the sole source of the risk faced by Machekia and her children was Franklin.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Pat M. Donofrio